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October 1, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Implementation of the Local Competition Provisions in
the Telecommunications Act of 1996, Intercarrier Compensation for ISP-
Bound Traffic, CC Docket Nos. 96-98 and 99-68

Dear Ms. Dortch:

In recent weeks, the Commission has received a flurry of *ex parte* submissions, including this and other *ex partes* submitted on behalf of KMC Telecom, Inc. ("KMC"), XO Communications, Inc. ("XO") and Xspedius Communications, LLC ("Xspedius"), on how it should resolve issues related to reciprocal compensation for ISP-bound traffic now on remand for the second time from the D.C. Circuit. A decision regarding these matters is long over due.

ISP-Bound Traffic Is Subject to Reciprocal Compensation under Section 251(b)(5)

The Commission's removal of legally flawed rules that benefit solely incumbent LECs at the expense of competitive LECs, their ISP customers and the multitude of consumers who use "dial-up" to reach their ISP of choice is not only the correct legal outcome, it is, for numerous reasons, the correct policy outcome. The weight of the *ex partes*, as well as the D.C. Circuit's opinions, point toward a clear result: ISP-bound traffic is subject to reciprocal compensation under section 251(b)(5). A decision holding that ISP-bound traffic is subject to reciprocal compensation under section 251(b)(5) is the only legally sustainable outcome. After years of regulatory uncertainty, legal sustainability should be a paramount goal.

As some have noted, such an outcome actually serves the Commission's goal of rationalizing diverse forms of intercarrier compensation. As the Commission correctly found in

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the *ISP Remand Order*, section 251(b)(5) does not turn on whether traffic is local.¹ It should not now be goaded into thinking that it turns on whether traffic is interstate.² Section 251(b)(5) applies to *all telecommunications traffic*. Any theory that puts some of that traffic exclusively within the FCC's realm is sure to put something else without.

As the Supreme Court already has recognized, under sections 251(b)(5) and 252(d)(2), the FCC has ample room to adopt guidelines that can form and, in large measure, control the resolution of reciprocal compensation issues.³ The one thing it seems that it cannot do is to actually set rates.⁴ Each argument filed to date that says the FCC can simply usurp the state commissions' role under section 252 – whether on a section 251(i) or on a section 201 theory, or some combination thereof – ignores the section 251(g) debacle that was laid to rest by the *WorldCom* court and fails to provide a rational legal basis for replacing the words “State commission” that appear in section 252(d)(2) with “FCC”.

In any event, if there is a theory under which the FCC can set rates for traffic subject to reciprocal compensation under section 251(b)(5), it would certainly be a novel one and it might not rest on the Commission's legacy jurisdiction under section 201. The Commission should explore such theories and seek the industry's input on them. There is no compelling need to adopt a vulnerable theory now that may get overturned or that may get upheld and then tie the Commission's hands later. For now, there is an obvious and legally sustainable solution: section 252(d)(2) rates for ISP-bound traffic. The Commission can set such a rule while reserving all rights to explore the impact of its jurisdiction under 201, and 251/252, for that matter.⁵

Thus, even if there is a legally sustainable argument whereby the FCC actually can set a compensation rate for a subset of (or all) section 251(b)(5) traffic, the FCC should only

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, FCC 01-131, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶¶ 45-46 (rel. Apr. 27, 2001), *remanded without vacatur*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*ISP Remand Order*”).

² *See Ex Parte* Brief of BellSouth Corporation and Verizon in CC Docket Nos. 96-98 and 99-68 (“Internet Bound Traffic is not Compensable Under Sections 251(b)(5) and 252(d)(2)”), filed May 17, 2004; Supplemental White Paper of BellSouth Corporation and Verizon on ISP Reciprocal Compensation in CC Docket Nos. 96-98 and 99-68, filed July 20, 2004.

³ *See AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 384-85 (1999).

⁴ Per section 332, the Eighth Circuit found CMRS traffic to be an exception to this rule. There is no section 332 analogue for ISP-bound traffic.

⁵ Notably, the Commission's determinations regarding inter-carrier compensation for CMRS traffic have not diminished its section 332 jurisdiction.

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avail itself of that option in the context of broader intercarrier compensation reform. Perpetuation of non-cost based rates (non-251(b)(5)/252(d)(2) rates) for some section 251(b)(5) traffic only creates another rate level and another opportunity for arbitrage.⁶ If rationalization is to involve a single rate for all traffic within the FCC's reach, a rational first step would be to require the same cost-based rate for all section 251(b)(5) traffic.

Growth Caps and the New Market Bar Must Be Eliminated (Regardless of the Statutory Theory that May or May Not Be Used to Resolve the Rate Issue)

The existing regime of non-252(d)(2) compliant rates, growth cap and new market bars results in an unearned windfall for the incumbent LECs and, most perniciously, it protects them and their affiliates from new and intensified competition in the ISP market. There simply is no compelling or rational basis for not eliminating the growth cap and new market rules immediately. These rules affirmatively dis-serve a purpose by hobbling competitive LECs' ability to expand their offerings to new customers and new markets. Protecting incumbent LECs in this manner and denying consumers of alternative means of connectivity to the Internet is bad for the economy and bad for consumers. Notably, the consumers hardest hit by the existing regime are those who choose dial-up because they cannot afford broadband, cannot get broadband, or simply have not developed the demand for broadband (although they might – and that should be encouraged). The growth cap and new market rules act as a booted foot on the neck of competitive LECs, ISPs and consumers; the Commission must provide relief by eliminating them.

⁶ Yes, incumbent LEC avoidance of cost-based reciprocal compensation obligations is arbitrage. If the penny-a-minute rates that prevailed in late 1990s were too high, it is because the incumbents themselves set them or had too strong a hand in setting them. Today's state commission-approved and section 252(d)(2) compliant rates are much lower. Certain states have even adopted new rate structures that further drive down the rates associated with calls, such as ISP-bound calls, that typically have long holding times. And, there is seldom heard a claim from the incumbent LECs that these TELRIC-based rates for switching functionality are *too low*, as they are seemingly pre-programmed to complain about other TELRIC-based rates. On the other-hand, the prevailing FCC-set rate of \$0.0007 is generally much lower than the TELRIC-based reciprocal compensation rates which the LECs had every incentive to drive down. The FCC-set rate, is by definition, below cost. Whether above or below cost, somebody gains and somebody loses. In the case of ISP-bound traffic, the FCC-set below cost rate results in the FCC picking the incumbent LECs as the winner of an undeserved subsidy from their much smaller competitors. With the uniform application of cost-based rates – carriers simply pay for what they get – and there are no winners and losers arbitrarily chosen.

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ISP-Bound Traffic Is Not Subject to Intrastate Access Charges

Competitive LECs often provide ISPs with virtual-NXX services that enable ISPs to serve consumers more efficiently and cost effectively. Often, it is these arrangements that make it possible to cost-effectively serve a greater number of geographic areas and consumers that may live in less populated suburban and rural areas. Contrary to CenturyTel's claims, these vNXX arrangements impose no additional transport obligations on the incumbent LECs – they bring traffic to the same point of interconnection regardless of whether a vNXX arrangement is used.⁷ They also do not cause or contribute to toll blockage, as the calls are delivered over local interconnection trunks.⁸ What does happen, however, is that the incumbent LEC is no longer able to force a consumer to make a toll call. Allowing consumers not to be forced into placing toll calls to access the Internet via non-incumbent LEC-controlled ISPs is not at all bad policy. In fact, it is affirmatively good policy. Moreover, it is the legally correct outcome for a number of reasons. First, ISP-bound calls have never been subject to access charges, regardless of where servers or billing addresses are located. These calls are subject to section 251(b)(5) and 252(d)(2) which effectively bars application of originating and terminating access charges.⁹ Second, ISP-bound calls are neither exchange access nor toll, by definition.¹⁰ And, finally, since ISP-bound traffic is jurisdictionally interstate, intrastate access charges cannot apply. At bottom, one thing is indisputable: intrastate access charges cannot apply to ISP-bound traffic, regardless of delivery method. In order to correct the detrimental effect on consumers, competitors and the growth of the Internet as an increasingly critical part of the national economy, the Commission must at this juncture affirmatively pre-empt any state commission decisions that apply intrastate access charges to ISP-bound traffic or that either fail to comport with the requirements of section 252(d)(2) or that differ from any FCC-set rate.¹¹

⁷ *Ex Parte* Letter from Tonya Rutherford, Esq., CenturyTel, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission in CC Docket Nos. 96-98, 99-68 and 01-92 (Sept. 24, 2004) at 1.

⁸ *See id.*

⁹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, FCC 96-325, First Report and Order, 11 FCC Rcd 15499, ¶ 1033 (rel. Aug. 8, 1996) (“*Local Competition Order*”).

¹⁰ Under section 3(16), “exchange access” means the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services. Under section 3(48), “telephone toll service” means telephone service between stations in different exchange areas for which there is made a separate charge not included in the contracts with subscribers for exchange service.

¹¹ Again, KMC, XO and Xspedius do not at this time recognize a legal basis upon which the FCC could set compensation rates for section 251(b)(5) traffic. However, if the FCC were to take that course, it should most certainly preempt state commission decisions that apply different rates (including bill-and-keep/zero rate) and rate structures (intrastate access charges).

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A Holding that ISP-Bound Traffic Is Once Again Not Subject to Section 251(b)(5) and Is Instead Subject to a Different Intercarrier Compensation Scheme under Section 201 Is Not Legally Sustainable

In the face of two harsh defeats at the D.C. Circuit and strong indication from that Court that ISP-bound traffic is indeed subject to section 251(b)(5), some still argue that there is an exception or loophole intended by Congress that would alleviate them from having to pay cost-based reciprocal compensation to other carriers for the delivery of calls to ISPs. The twin sisters advocating this theory, Verizon and BellSouth, simply ignore the Commission's own definition of "termination"¹² and the D.C. Circuit's guidance on it in the *Bell Atlantic* decision. Although drawn-up in impressive length, the Verizon/BellSouth argument rests upon nothing more than fiction and word-play.¹³ The fact of the matter is that when calls are made to ISPs, the LEC serving the ISP performs a termination function when it delivers the call to the ISP. Thus, Verizon and BellSouth's attempt to throw ISP-bound traffic into a void created by a false exception to section 251(b)(5) must be rejected. The statute and the FCC's definition point toward a functionality called "termination" and prescribes that carriers be compensated for performing it. To say that an ISP-bound call does not "terminate" when a CLEC delivers a call to an ISP is tantamount to saying that a flight that connects through a hub in Atlanta does not land there. Not only is there no legal merit to the argument (indeed, the D.C. Circuit saw no legal merit in the argument when rejecting it in the *Bell Atlantic* decision¹⁴), it defies common sense. Moreover, the fact that termination occurs at intermediate points of a communication – which fairly can be called intermediate termination points – does not impact the Commission's assertion of section 201 jurisdiction based on the ultimate end-points, or final termination point (which, incidentally, is likely to be multiple points, many actually local and not across the states and the globe).

SBC, while good enough to expose the "does not terminate"/non-section 251(b)(5) charade presented by its siblings, does not put forth a more coherent theory. Although difficult to discern or make any sense of, SBC appears to present a hybrid of arguments rejected in the *Bell Atlantic* and *WorldCom* decisions. According to SBC, the Commission's 1983 decision not to include ESPs in the interstate access charge scheme somehow makes ISP-bound traffic subject to section 251(g), as well as section 251(b)(5) – and, as a result, the Commission

¹² 47 C.F.R. § 51.701(d). Under the Commission's current rules, "termination" is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

¹³ See *supra* n.2.

¹⁴ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000).

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gets to use section 251(i) to invoke section 201 powers to modify the regime preserved under section 251(g) so as to add the additional (but not grandfathered) requirement of bill-and-keep for calls exchanged between LECs that then get delivered to ISPs, and to nullify section 252(d)(2) in the process. This wild ride is perhaps the most tortured of all statutory interpretations yet presented on the topic. But, it falls flat, as there simply were no pre-Act obligations relating to intercarrier compensation for ISP-bound traffic enshrined in the so-called ESP exemption, or elsewhere,¹⁵ that are preserved under section 251(g) or that could be modified via section 251(i) to arrive at a result other than section 251(b)(5) reciprocal compensation at section 252(d)(2) rates.

The so-called ESP exemption did not contemplate competitive LECs or the fact that a LEC serving an ISP would be required to incur the additional costs associated with the termination of locally dialed calls to ISPs from customers who were not their own.¹⁶ Further, ISPs are not IXC's. They do not use "exchange access", as it is defined in the statute, and they are not telecommunications services providers. In *Bell Atlantic*, the D.C. Circuit already indicated its view that the so-called ESP exemption did not at all suggest that ISP-bound traffic was outside the scope of section 251(b)(5).¹⁷ If anything, the court's opinion suggests that ISP-bound traffic is within the scope of section 251(b)(5). In *WorldCom*, the Court found that there was no intercarrier compensation scheme for ISP-bound traffic that could be preserved under section 251(g).¹⁸ Thus, it is inconceivable (as opposed to indisputable, as SBC suggests) that the so-called ESP exemption creates an access charge regime that pulls ISP-bound traffic at least partially or temporarily outside the scope of sections 251(b)(5) and 252(d)(2) and into a realm where sections 251(g), 251(i) and 201 collide to result in bill-and-keep/zero-rated reciprocal compensation for ISP-bound traffic.¹⁹

¹⁵ Under SBC's theory, the "ESP exemption" becomes the "ESP access charge regime", which is somehow preserved under section 251(g).

¹⁶ SBC's assertion that there are no additional costs caused when one carrier sends a call to another that requires transport and termination is factually incorrect. *ISP Remand Order*, ¶¶ 91-92.

¹⁷ *Bell Atlantic*, 206 F. 3d at 335.

¹⁸ *See WorldCom*, 288 F.3d at 433.

¹⁹ Given SBC's failure to compete effectively for ISP customers, bill-and-keep for ISP-bound traffic would be a sizable regulatory windfall to SBC accomplished via an unconstitutional taking from carriers who serve ISPs that chose not to buy service from SBC. Like SBC, Qwest suggests bill-and-keep without providing a legally sustainable explanation as to how it could be imposed for out-of-balance traffic. *See* SBC Sept. 13, 2004 *Ex Parte* at 5, Qwest May 21, 2004 *Ex Parte* at 3. Contrary to Qwest's suggestion, a "robust" interpretation of section 252(d)(2)(B)(i) does not appear to permit the Commission to do anything. Under Section 252(d)(2), state commissions set or approve reciprocal compensation rates. And section 252(d)(2)(B)(i) does not permit the states to adopt bill-and-keep for out of balance traffic either, as that

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A “Pure” Section 201 Theory Raises Vexing Problems and Threatens Consumers’ Access to the Internet

A “pure” section 201 resolution of the matter presents a host of other vexing problems – in addition to those caused by a lack of legal sustainability and the needless regulatory uncertainty that would ensue from such a false resolution. Chief among these problems are issues created by, as the incumbent LECs will argue, taking such traffic outside the scope of section 251. Today, ISP-bound traffic is exchanged via local interconnection trunks and pursuant to state commission approved interconnection agreements. It is foreseeable that the incumbent LECs will push to move such traffic off of TELRIC-priced section 251(c)(2) interconnection facilities and onto over-priced special access facilities. Higher costs have consequences. The consequences here would result in higher rates for dial-up internet access, which is the only option in some areas and for some who simply cannot afford or do not have the need for broadband – even if they could get it. The detrimental impact of a non-251(b)(5) decision would certainly hit less densely populated areas and less economically privileged consumers hardest.

Enforceability, although never easy under a section 251 construct, would become an evermore vexatious problem in a section 201 scheme. When the incumbents again refuse to pay, what will be enforced and who would enforce it? Would any competitors be able to withstand the process or will the choices for ISPs dry-up? The Commission needs to remember that non-affiliated ISPs have predominantly switched to competitive LECs for better service at better prices. What good could come from forcing them back on to the incumbent LECs’ networks?

would conflict with the cost recovery scheme set forth in sections 251 and 252 that establishes LEC-to-LEC traffic exchange obligations and may otherwise result in an unconstitutional taking. *See* U.S. Const. art. V.

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A "Pure" Section 201 Theory Does Not Add to the FCC's Jurisdiction and Section 251(b)(5) Compensation Does Not Diminish It

Few carriers challenge the Commission's determination that ISP-bound traffic is jurisdictionally interstate. Yet, it has been suggested that a "pure" section 201 resolution to these issues is necessary to preserve the FCC's claimed jurisdiction over the Internet. It is difficult to see why that is necessary (or how a non-251(b)(5) solution could be legally defensible). The Commission would not cede its section 201 jurisdiction by properly finding that ISP-bound traffic is subject to section 251(b)(5) reciprocal compensation. Section 251(i) makes that clear. Moreover, the Commission does not waive jurisdiction by allowing states to set compensation rates – subject to FCC guidelines – under section 252(d)(2). The Commission also cannot lawfully add to its jurisdictional mandate – only Congress can do that. And so, for comfort, the Commission can affirmatively reserve all rights to explore the scope of its jurisdiction under section 201. That should do more than is needed to preserve the Commission's jurisdiction over the Internet.

In accordance with section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, a copy of this letter has been filed in the above-referenced proceeding. Please feel free to contact me at (202) 955-9888 if you have any questions.

Respectfully submitted,



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